No. 83-1050

IN THE

Supreme Court of the United States

October Term, 1983

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

TOUCHE ROSS & CO.,

Respondent.

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

SAM BATTISTONE, SR., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented.

Assuming proper disqualification of a plaintiff's counsel, did the District Court's disqualification of co-counsel, under the surrounding facts and circumstances, constitute an abuse of discretion?

Parties to the Proceeding.

Although Petitioners allege that they are the named representatives for a class of 375 members in two actions consolidated for argument and decision, *Phillip Emrich and Eric Gillberg v. Touche Ross & Co.* was never certified as a class action.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

This Brief in Opposition, on behalf of Respondent Touche Ross & Co. ("Touche"), addresses only the action known as *Phillip Emrich and Eric Gillberg v. Touche Ross & Co.*, No. 81-5940, D.C. No. CV 81-4104R. Touche is not a party to the action known as *Phillip Emrich and Eric Gillberg v. Sam Battistone, Sr., et al.*

I.
OPINIONS BELOW.

The Order of the District Court for the Central District of California is unreported. The Memorandum of the Court of Appeals for the Ninth Circuit which Petitioners ask this Court to review is also unreported, as is the Court of Appeals' Order Denying Petition for Rehearing. The District Court's Order and the Court of Appeals' Memorandum and Order are set out in the Appendix to the Petition for Certiorari ("Petitioner's Appendix").

II.
JURISDICTION OF THIS COURT.

Touche contends that this Court should not exercise the jurisdiction conferred upon it under 28 U.S.C. §1254(1) for the following reasons.

1. None of the Opinions below are reported. Therefore they have no precedential value.

2. The issue as framed by Petitioners is:

> "1. May a party's chosen counsel be automatically disqualified *solely* because of a prior representation by co-counsel of an adverse party?"

That is a non-issue. Touche agreed in its appellate brief, and presently agrees, that the answer to that question is: "no". However, that answer does not presently resolve and would not have resolved the issues before the Ninth Circuit Court of Appeals ("Ninth Circuit").

The issues on appeal relevant to the Petition were: (1) whether the disqualification of Mullen & Stabile was an abuse of the trial court's discretion, and if not; (2) whether the disqualification of Mullen & Stabile's co-counsel under the surrounding facts and circumstances was an abuse of the trial court's discretion.

3. This Court has previously held that the question presented to this Court must be a distinct point or proposition of law; that it must not be a question of fact or of mixed law and fact. *Felsenheld v. United States* (1902) 186 U.S. 126.

The ultimate question of the propriety of the disqualifications is one which can only be resolved after deciding various preliminary issues and upon examination of all of the facts presented to the District Court. This Court previously stated that it will not do so. *Pflueger v. Sherman* (1934) 293 U.S. 55.

4. It is clear and previously decided law, in this and other circuits, that counsel and co-counsel may be disqualified under proper circumstances. Thus, the Ninth Circuit's Decision is not in conflict with its reported decisions or those of other circuits. *Trone v. Smith*, 621 F.2d 994 (1980); *In Re Airport Car Rental Antitrust Litigation*, 470 F.Supp. 495 (N.D. Cal. 1979); *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977).

5. The Ninth Circuit's Memorandum of Decision rested in part on state law. Rule 4-101, *infra* p. 10.

Based on the foregoing and the facts and law set forth below this Court should decline jurisdiction and deny the Petition.

III.
STATEMENT OF THE CASE.

On or about August 12, 1981 Petitioners filed a purported class action against Touche for alleged violations of Federal and California securities laws, common law fraud and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. §1961 *et seq.*, allegedly arising from Touche's preparation of financial statements

for inclusion in prospectuses disseminated by Sambo's Restaurants, Inc. ("Sambo's") in connection with the sale of partnership interests in restaurant joint ventures.

At that time, also pending in the United States District Court for the Central District was a class action by *James Muller, et al. v. Sambo's Restaurants, Inc., et al.*, Case No. CV 80-3757R (JRX) ("*Muller*"). *Muller* was based on the same transactions as this action, but Touche was not a defendant. All counsel for Petitioners in this Action were also attorneys for plaintiffs in *Muller*.[1]

In response to the Complaint, Touche moved to disqualify all of Petitioners' counsel based on the facts in the declarations of Norman C. Grosman, a partner in Touche (Appendix A) and Jay Ziegler, a member of Buchalter, Nemer, Fields, Chrystie & Younger, attorneys for Touche. (Appendix B).

Touche is a partnership of certified public accountants. (Appendix A at ¶2).

Prior to 1974, while Stabile was an associate with the firm of Gibson, Dunn & Crutcher, he performed services for Touche. In or about 1974 Stabile ceased his association with Gibson, Dunn & Crutcher and formed an office for the practice of law under the name of Mullen & Stabile. (Appendix A at ¶¶4 and 5).

When Mullen & Stabile was formed, Stabile was actively defending Touche in an action in the United States District Court for the Central District of California, *Cerro Corporation v. Touche Ross & Co., etc. et al.*, Case No. 73-1RF.

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[1]Also pending in the United States District Court for the Central District was a class action *Don Farris and James Duncan v. Touche Ross & Co.*, Case No. CV 82-0398R and a class action by *Phillip Emrich and Eric Gillberg v. Sam Battistone, et al.*, No. CV 81-4547R (JRX) who are alleged to be former officers and/or directors of Sambo's. Those actions arise from the same transactions as this action.

Touche retained Mullen & Stabile to continue its representation in that litigation and from 1974 to mid-1979 Stabile actively represented Touche in connection with that matter. (Appendix A at ¶¶4 and 5).

During its representation of Touche, Mullen & Stabile had access to information and personnel within Touche for the purpose of analyzing and preparing Touche's defenses to charges of professional misconduct by Cerro Corp., another publicly held company. During the course of their representation, Mullen & Stabile discovered and were provided information which was privileged, confidential and proprietary as to Touche. Mullen & Stabile became intimately acquainted with the auditing systems and procedures of Touche and intimately acquainted with Touche's policies and procedures specifically regarding the defense of securities litigation. (Appendix A at ¶¶6 and 8).

Mullen & Stabile was paid over *$250,000* in attorney fees for services rendered in connection with the *Cerro* litigation. (Appendix A at ¶7).

The auditing services which were challenged in the *Cerro* litigation had been performed primarily by Touche's Los Angeles office, some of which were performed by and under the supervision of James Crosser, a partner of Touche. The auditing services being challenged in this action were performed, in part, by Touche's Los Angeles office under the supervision of James Crosser. (Appendix A at ¶¶8 and 9).

The instant Complaint alleges that Touche personnel were engaged in fraud and racketeering activities from 1977 through 1979 — the very same time period that Mullen & Stabile was defending Touche against allegations that it had failed to perform its services in a professional manner. (Appendix A at ¶10).

On August 11, 1981 Touche's deposition was taken in the *Muller* action. Since Mullen & Stabile was counsel of

record for Touche through 1979, Touche assumed that its deposition was being taken by plaintiffs merely as a non-party witness. Only after inquiry during the course of the deposition was it announced that plaintiff's counsel intended to file an action against Touche. The Complaint was filed the next day. (Appendix B at ¶¶2, 3 and 4).

Stabile's declaration filed in opposition to the Motion to Disqualify did not contradict Mr. Grosman's declaration that, in the course of representing Touche in the *Cerro* litigation, Mullen & Stabile acquired substantial proprietary information, and other confidential information regarding the auditing practices and procedures of Touche and the defense of those practices and procedures in litigation. The thrust of Stabile's declaration (Appendix C at ¶¶10 and 12) is that he did not disclose such information to co-counsel and that the knowledge Stabile acquired, insofar as relevant, is discoverable.

Stabile telephoned Rick Murray, general counsel for Touche, to discuss his representing plaintiffs in this action since he perceived the issue of a possible conflict of interest, but was unable to reach Mr. Murray. (Appendix C at ¶¶19, 20 and 21).

Stabile's telephone call to Mr. Murray can only mean that he was aware that his representation of the plaintiffs in this action gave the appearance of impropriety.

Even though Stabile denied knowledge of information directly concerning the Sambo's audit (Appendix C at ¶9) it is inevitable that the same or similar defenses will be asserted in this action as in the prior action since what is really at issue here are the auditing practices and procedures of Touche, something with which Mullen & Stabile, according to the unrefuted declaration of Norman C. Grosman, is intimately acquainted.

The disqualification of Mullen & Stabile's co-counsel was necessary to preserve Touche's confidences. Co-counsel's ongoing association with Mullen & Stabile in this action created the possibility of disclosure of confidential information which could be used against Touche. Also, Mullen & Stabile and co-counsel represented the plaintiffs in the *Muller* action. Thus, merely disqualifying Mullen & Stabile in this action was inadequate to safeguard Touche's interests or to avoid the appearance of professional impropriety. Because of the presumed free flow of information between Mullen & Stabile and their co-counsel, Touche sought the disqualification of all Petitioners' counsel.

Touche concurrently filed a separate motion for an order striking the Complaint under Federal Rule of Civil Procedure 11 or in the alternative dismissing the RICO claim. The motion to strike is not at issue in Petitioners' Petition. However, it was based upon the facts set forth in the motion for disqualification and the conduct of attorneys for Petitioners with respect to Touche's deposition.

On these facts, after oral argument, the district court granted the motion to disqualify all counsel and dismissed the Complaint without prejudice. It was on these facts that the Ninth Circuit affirmed the District Court's order.

IV.
THIS COURT SHOULD NOT GRANT THE WRIT.

A. The Standard of Review on Appeal Is Whether the Trial Court Abused Its Discretion.

The District Court's order did not and was not required to state that disqualification was based solely on the appearance of impropriety. *In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1351 (9th Cir. 1981), *cert. denied* 455 U.S. 990 (1982) held that "an order disqualifying counsel will not

be disturbed if the record reveals 'any sound' basis for the District Court's action." 658 F.2d at 1358.

Abuse of discretion is the standard of review. *Gas-A-Tron of Arizona v. Union Oil Co. of California*, 534 F.2d 1322 (9th Cir. 1976). Thus, Petitioners' argument that the order of the District Court is defective for failure of the District Court to articulate the principles upon which it issued its order is, at best, unconvincing. The Ninth Circuit adopted an "abuse of discretion" standard of review and correctly affirmed the District Court's order on the ground that the record demonstrated that it did not abuse its discretion under application of Canon 9 of the ABA Model Code of Professional Responsibility and Rule 4-101, of the State Bar Rules of Professional Conduct. The Ninth Circuit's Memorandum of Decision correctly reflects the law in this and other circuit courts as argued below.

B. There Was and Is No Issue That Mullen & Stabile Acquired Confidential Information Relevant to This Case in Its Prior Representation of Touche.

Touche does not disagree with Petitioners' contention that the knowledge acquired by counsel in the former representation must be of a confidential nature.

The evidence before the District Court was a declaration (Appendix A) which unequivocally stated that Mullen & Stabile not only acquired confidential information but acquired confidential information of a nature which could be used in the present litigation against Touche.

Stabile admitted, in Petitioners' response to Touche's motion for disqualification *that he did have access to confidential information* (Appendix G at ¶10):

> "During the course of my representation of Touche Ross, I of course engaged in many confidential communications with Touche Ross personnel."

C. Disqualification of Mullen & Stabile Was Not an Abuse of the Trial Court's Discretion.

Petitioners contend that the Ninth Circuit Memorandum disregarded the "general rules" governing attorney disqualification and that it conclusively presumes that confidential information was transmitted. The cases and rules set forth below demonstrate that the Ninth Circuit's Decision is not in conflict with its prior opinions or those of other circuits.

Trone v. Smith, 621 F.2d 994 (9th Cir. 1980) is the dispositive case on attorney disqualification in the Ninth Circuit. Under *Trone* disqualification is compelled when a former representation is "substantially related" to the present representation. Substantiality is present if the factual contexts of the two representations are similar or related. The primary criterion is whether there is "a reasonable probability that confidences were disclosed which could be used against the client in a later, adverse representation." If the latter exists, a substantial relationship between the two cases is presumed. *Trone v. Smith* at 998. There is no burden on the moving party to demonstrate that counsel has in fact breached the attorney-client privilege and disclosed confidential information.

Where issues involved in both lawsuits concern allegations of fraudulent or improper preparation of documents, disqualification is proper. *Government of India v. Cook Industries, Inc.*, 569 F.2d 737 (2d Cir. 1978).

Violation of the broad admonition of Canon 9 which provides that:

> "A lawyer should avoid even the appearance of professional impropriety"

is a basis for attorney disqualification since "no man can serve two masters." *Cinema Five Ltd. v. Cinerama, Inc.*,

558 F.2d 1384, 1385 (2d Cir. 1976).

Rule 4-101 of the Rules of Professional Conduct of the State Bar of California provides:

> "A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."[2]

These rules applied to the facts set forth above demonstrate that the Ninth Circuit could only have affirmed the District Court's order.

Furthermore, Rule 4-101 is a rule of State Law; and a decision based thereon is not properly reviewed by this Court.

D. Disqualification of Co-Counsel Did Not Constitute an Abuse of Discretion.

Petitioners argue that even if the court properly disqualified Stabile it was unnecessary to disqualify co-counsel because the disqualification of Stabile would have given Touche all the protection that it needed.

Petitioners contend that the Ninth Circuit was obligated to determine whether confidences had been disclosed so that Touche was likely to be unfairly disadvantaged.

As set forth in *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978):

> "The evidence need only establish the scope of the legal representation and not the actual receipt of the

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[2]Local Rule 1.3(d) of the United States District Court for the Central District of California has adopted the Rules of Professional Conduct of both the State Bar of California and the ABA Model Code of Professional Responsibility.

> allegedly relevant confidential information . . . doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification.
>
> . . . .
>
> "[T]he determination of whether there is a substantial relationship turns on the possibility or appearance thereof, that confidential information might have been given to the attorney in relation to the subsequent matter in which disqualification is sought. The rule thus does not necessarily involve any inquiry into the imponderables involved in the degree of relationship between the two matters but instead involves a realistic appraisal of the possibility that confidences had been disclosed on the one matter which will be harmful to the client in the other. *The effect of the Canons is necessarily to restrict the inquiry to the possibility of disclosure; it is not appropriate to inquire into whether confidences were disclosed.*" At page 224 (emphasis added).

Mullen & Stabile have not alleged an attenuated relationship with their co-counsel. Mullen & Stabile had a continuing association with their co-counsel in the *Muller* action which was identical in all material respects to this action. Therefore, Mullen & Stabile, even if disqualified from this action would still have been actively participating with co-counsel in *Muller*.

Even though Mullen & Stabile deny the disclosure of confidential information to co-counsel, the statement in Stabile's declaration that relevant confidential information will be subject to discovery, presented a genuine threat of disclosure.

The Court in *In Re Airport Car Rental, supra* held disqualification of co-counsel should be determined in accordance with the facts of each case.

Hull v. Celanese Corp., 513 F.2d 568 (5th Cir. 1975) is a case in which the Fifth Circuit affirmed an order dis-

qualifying a law firm in similar circumstances to those present here.

> "In *Hull* the plaintiff-attorney possessed confidential information concerning the opposing party's *strategy* in that particular case. Furthermore, unlike the case at bar, where once the Fujiyama firm is disqualified there would be no further consultation between the Fujiyama firm and Phillips, Nizer, in *Hull*, as the District Court noted, there would have been an *ongoing risk* of improper disclosure." 470 F.Supp. at 504.

That is precisely the risk that was before this Court in view of the relationship of Mullen & Stabile to their co-counsel in this and the *Muller* litigation.

In addition, one should look to Disciplinary Rule 5-105(D) of the A.B.A. Code:

> "If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

Cases construing that rule have generally confined it to the law firm of the lawyer whose disqualification is sought. However, the close association of Mullen & Stabile with their co-counsel stands them in the same shoes as lawyers of a single law firm such that the application of DR 5-105(D) to these facts compelled the disqualification of all counsel.

A similar case to the one before this Court is *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977), where the Second Circuit relied in part upon DR 5-105(D) in disqualifying counsel.

Petitioners also argue that the Ninth Circuit Memorandum disregarded the detriment to the Petitioners' cause, by the disqualification of their chosen counsel. That argument is

rooted in the notion that the same attorneys having handled the *Muller* action in which they had already invested hundreds of hours developing facts, taking depositions and otherwise preparing for trial meant that disqualification would require losing the benefit of that preparation in this case against Touche. That argument only supports Touche's contention that the ongoing and continued relationship between Mullen & Stabile and their co-counsel in the *Muller* action absolutely required their disqualification in this action. This is particularly so since Petitioners consistently contended that the most efficient use of the class' resources would have been a joint prosecution of the *Muller* and Touche actions. Petitioners have attempted to use the *Muller* action as a shield against disqualification of their counsel in this action. However, that very shield was a sword against Touche if Mullen & Stabile's co-counsel had not been disqualified.

In this action, no discovery had commenced, and no time was wasted by Touche in responding to the Complaint by way of the Motion to Disqualify. It was Petitioners' counsel who chose to delay bringing an action against Touche. Petitioners' counsel cannot bootstrap their own improper conduct with a claim of prejudice.

V.
CONCLUSION.

Touche presented the District Court with a compelling factual basis for disqualifying Mullen & Stabile and their co-counsel. The public's view of the law, of lawyers and the judicial system is unquestionably diminished by conduct which has the appearance of impropriety. There is no question that the prior representation of Touche in the *Cerro* litigation is so factually similar to this action that the risk of disclosure of confidential information was a clear and present danger.

Furthermore, the continued association of Mullen & Stabile with its co-counsel in the *Muller* action compelled the conclusion that there would be free communication between the law firms and the possibility of disclosure of confidential information.

For all of the foregoing reasons it is respectfully submitted that this Court deny the Petition.

Respectfully submitted,

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RICHARD H. MURRAY, ESQ.,
TOUCHE ROSS & CO.,
By ELIHU M. BERLE,
Counsel for Respondent,
Touche Ross & Co.

APPENDIX A.

Declaration of Norman C. Grosman.

I, NORMAN C. GROSMAN, declare:

1. I am a partner of defendant, Touche Ross & Co., and if called as a witness, I could and would testify to the following facts all of which are within my personal knowledge.

2. Touche Ross is a partnership of certified public accountants with offices throughout the United States. The firm is organized as a single partnership with its executive office in New York City, New York.

3. I became associated with Touche Ross in 1953, and became a member of the firm in 1967. I was located in the Los Angeles, California office of Touche Ross from 1963 through 1979, and during the years 1974 through 1979, I was associated with the firm's Legal Department and worked at the direction of the firm's General Counsel, Richard H. Murray. During that period, my responsibilities included serving as the liaison between the firm and its outside counsel, including Gibson, Dunn & Crutcher and Mullen & Stabile. I am presently assigned to the firm's executive office in New York.

4. Prior to 1974 Gary Stabile, one of the attorneys for plaintiffs herein, was associated with the firm Gibson, Dunn & Crutcher, and in the course of that association, performed services on behalf of Touche Ross & Co., including work on the case *Cerro Corporation v. Touche Ross & Co., a partnership; Joseph De Franco, Andrew Berkey, II, Sidney L. Steinberg, William F. Staunton, Ralph Weinstock* in the United States District Court of the Central District of California, *Case No. 73-1-RF*. By an order dated 9/12/77 *Marmon, Inc.* was substituted as party plaintiff in place of *Cerro*.

5. In or about 1974 Mr. Stabile ceased his association with Gibson, Dunn & Crutcher and formed an office for the practice of law under the name of Mullen & Stabile. At that time, that firm and Mr. Stabile, jointly with Gibson, Dunn & Crutcher, undertook the representation of Touche Ross and its partners and employees in that litigation described in Paragraph 4 above. That litigation remained active through at least May, 1979.

6. During the course of their representation, Mullen & Stabile had access to information concerning practices, procedures, and policies of the firm with respect to the conduct of its professional practice and the defense of that practice in the context of litigation. Additionally, Mr. Stabile had access to and conducted extensive, privileged conversations with partners and employees of the firm for the purpose of analyzing and preparing the firm's defenses to charges of professional misconduct. During the course of this representation, Mullen & Stabile discovered, and was provided, information which was privileged, confidential, and proprietary.

7. During the course of the above-described representation, Touche Ross paid Mullen & Stabile more than $250,000.00 in fees for services rendered in connection with the *Cerro* litigation.

8. The auditing services which were being challenged in the *Cerro* litigation were professional services which had been performed, primarily by the Los Angeles office of Touche Ross, on behalf of a publicly held company. Some of those services had been performed by and under the supervision of James Crosser, a partner of Touche Ross.

9. The professional services being challenged in the instant action include services which were performed by James Crosser.

10. The allegations of the instant Complaint include allegations that Touche Ross personnel were engaging in fraud and racketeering activities during the time period 1977 through 1979. It was during this very same time period that Mullen & Stabile was representing Touche Ross and defending it against allegations of professional misconduct.

11. Defendant seeks the disqualification of Mullen & Stabile because there is potential injury to Touche Ross by their representation of plaintiffs herein. They acquired knowledge and information, of a privileged and proprietary nature, in their prior representation of defendant and that information bears directly upon the instant litigation.

12. Defendant also seeks the disqualification of all of the law firms representing plaintiffs because of their intimate association and connection with Mullen & Stabile and the assumed free flow of information between each of them and Mullen & Stabile.

13. I declare under penalty of perjury that the foregoing is true and correct. Executed at New York City, New York, this 14th day of September, 1981.

[SIGNED]

NORMAN C. GROSMAN

APPENDIX B.

Declaration of Jay R. Ziegler.

State of California, County of Los Angeles — ss.

I, JAY R. ZIEGLER, declare:

1. I am an attorney at law duly licensed to practice before this court and all courts in the State of California. I am a member of the firm of Buchalter, Nemer, Fields, Chrystie & Younger, a Professional Corporation, attorneys for Defendant Touche Ross & Co. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify thereto.

2. On August 11, 1981, the deposition of Touche Ross & Co. was taken by the Plaintiffs in *James Muller, et al. v. Sambo's Restaurants, etc., et al.*, case No. CV 80-3757, R (JRx) (the "Muller case"). I personally was present and represented Touche Ross at the deposition. Mr. Richard E. Herrinton, a partner of Touche Ross, testified on its behalf. Also present was Gary Stabile of the firm of Mullen & Stabile.

3. The deposition was pursuant to Notice. Based on the Notice that was received, it was Touche Ross' understanding that it was being deposed as a non-party witness in that matter, especially since Mullen & Stabile, attorneys for Plaintiffs in the Muller case, had recently been counsel for Touche Ross for a number of years in a matter in which the accounting practices of Touche Ross were in issue. Prior to and at the deposition I was unaware of the fact Mullen & Stabile had represented Touche Ross. Immediately prior to the deposition, I was first informed that counsel might later determine to sue Touche Ross, but that a final decision had not been made and the deposition might assist in arriving at that decision.

4. At a break in the deposition, I was informed that Plaintiffs now intended to file a separate action against Touche Ross arising out of the same transactions as those which are in issue in the Muller case. The following colloquy then took place between counsel:

"MR. ZIEGLER: Let's go back on the record.

"At the beginning of the deposition before we went on the record, I asked Mr. Hennigan about the intentions of the parties he represented in suing Touche Ross either in a separate lawsuit or in this lawsuit, and he indicated that it was a good possibility, but he wanted to proceed with the deposition to determine whether or not he felt it would be appropriate.

"At the break that we have just had, he indicated that he is now almost certain that he will either file a separate lawsuit or somebody will file on behalf of his clients a separate lawsuit against Touche Ross or seek to join Touche Ross in the present lawsuit concerning the subject matter of this lawsuit.

"Based on that state of affairs, I don't think it is appropriate for the deposition to continue, since it is apparent now that the deposition has been and is more for the purpose of pursuing a cause of action against Touche rather than obtaining discovery against the existing defendants. And since Touche Ross has not been already named and has no notice of the specific claims against it, albeit Mr. Hennigan's statements that it would be similar to what the existing pleadings are, we don't think it is fair to Touche Ross to be giving discovery in anticipation of a lawsuit when they will certainly be available after the lawsuit is initiated to give discovery; and that that discovery should be done in accordance with the Federal Rules of Civil Procedure and not before we have been named as a defendant. So on that basis, we feel that we have no alternative but to terminate the deposition at this time.

"Of course, recognizing that if and when Touche is named as a defendant in this lawsuit and after the appropriate time period for initiating discovery in that lawsuit, we will be back again for the purpose of Mr. Herrinton's deposition.

"I might also add that since we did not come here in the contemplation that we were a party or would shortly be named a party, Mr. Herrinton certainly did not spend as much time refreshing his recollection and doing the other things that a party might do in connection with a lawsuit that a nonparty witness often does not concern himself with. So I think in that sense, we have been sandbagged, if I can assume that it was always the intention of the plaintiffs to name Touche Ross, even before this deposition." (Transcript of deposition of Richard E. Herrinton, page 59, line 14-page 61, line 3).

5. *The complaint against Touche Ross in the within action was filed on August 12, 1981, at approximately 12:00 noon one day after the deposition.* Thus, the complaint against Touche Ross had apparently been prepared prior to the deposition, and it was also apparently known prior to the deposition that Touche Ross would be made a party in a separate action. Therefore, it appears that the deposition of Touche Ross was solely for the purpose of pursuing a cause of action against Touche Ross. Touche Ross was unaware of the Plaintiffs' motivations and attended the deposition without having undertaken the preparation that a party would ordinarily undertake.

6. The conduct of Mullen & Stabile and Plaintiffs' other counsel who are the same here as in the Muller case with respect to Touche Ross' deposition indicates at the least a lack of candor and fair play and is exemplary of the type of conduct that Touche Ross' motion to disqualify seeks to prevent.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California, this 18th day of September, 1981.

[SIGNED]

JAY R. ZIEGLER

APPENDIX C.

Declaration of Gary D. Stabile.

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United States District Court, Central District of California.

Phillip Emrich and Eric Gillberg, Plaintiffs, v. Touche Ross & Co., Defendant. Case No. CV 81 4104.

1. I am an attorney admitted to practice before this Court and a member of the law firm of Mullen & Stabile, one of the firms representing plaintiffs in this action.

2. From the time of my admission to practice before this Court in 1968 until March, 1974, I was an associate with the firm of Gibson, Dunn & Crutcher.

3. Gibson, Dunn then acted as counsel to Touche Ross & Co. in a number of matters, including *Cerro v. Touche Ross & Co.*, the case referred to in the moving papers. I was one of the Gibson, Dunn attorneys working on that case.

4. In the spring of 1974 I formed, with my partner, the firm of Mullen & Stabile.

5. For reasons of economy and efficiency a decision was made, by the Gibson, Dunn partner in charge of the *Cerro* case, the general counsel for Touche Ross and myself, that I would continue to represent Touche Ross in the *Cerro* case.

6. My firm and I became associated with Gibson, Dunn, as counsel of record for Touche Ross in the *Cerro* case in mid-1974 and continued to act in that capacity in the action until it terminated in the spring of 1979.

7. Since the termfination of the *Cerro* case I have not been employed by Touche Ross to represent it in any other matter.

8. My representation of Touche Ross was limited to acting as special litigation counsel, in association with Gibson, Dunn, in the *Cerro* case, and in no other matter.

9. During the course of that representation I do not believe I was even aware that Touche Ross was the auditor for Sambo's Restaurants, Inc. I had no access to and did not see any of the Touche Ross files or working papers relating to its audits of (or other work done for) Sambo's.

I did not talk to any Touche Ross personnel about Sambo's and in fact I do not believe I talked to any Touche Ross personnel that to my present knowledge did any work for Sambo's.

10. During the course of my representation of Touche Ross I of course engaged in many confidential communications with Touche Ross personnel. I have not disclosed the contents of such communication to any person, including my co-counsel in this action (except of course my co-counsel in the *Cerro* case, i.e., the Gibson, Dunn lawyers with whom I was then working). I have not disclosed any information at all about Touche Ross to my co-counsel in this case because I have no information about Touche Ross which would be of any interest to my co-counsel.

11. During the course of my representation of Touche Ross I did not learn anything, of a confidential nature or otherwise, that has anything to do with this case.

12. I did have access to auditing manuals and procedures which Touche Ross regards as proprietary and confidential. I have not retained any such materials to the best of my recollection. Such materials were subject to discovery in the *Cerro* case and, to the extent relevant, would be subject to discovery in any other action.

13. In April, 1981, some two years after the termination of my representation of Touche Ross in the *Cerro* case, my firm was substituted as counsel for plaintiffs in *Muller, et al., v. Sambo's Restaurants, Inc., etc. et al.* (the "sister" case referred to in the moving papers).

14. During the course of discovery in the *Muller* case questions concerning the adequacy of disclosure in and the accuracy of Sambo's financial statements contained in the two prospectuses in issue in that lawsuit suggested them-

selves. Touche Ross audited and opined on those financial statements.

15. Analysis of the financial statements by the other plaintiffs' counsel in this action led to the tentative conclusion that they did not fairly represent the financial condition and results of operations of Sambo's for the period reported on.

16. The deposition of Richard Herrinton, the Touche Ross partner in charge of the Sambo's audits, was therefore scheduled. During the course of the deposition, under questioning by Mr. Hennigan, it became clear, based on Mr. Herrinton's testimony, that a proper regard for the interests of the class in *Muller* required that Touche Ross be named as a defendant. Counsel for Mr. Herrinton was so advised and he then terminated the deposition.

17. The purchases of securities which form the subject matter of both this and the *Muller* actions occurred in the period January - October 1978. Because of the danger that plaintiffs' rights in this case might become time barred, the action was filed as soon as possible after the termination of the Herrinton deposition.

18. Between April, 1981 and July, 1981, when additional plaintiffs' counsel were associated, my firm, my partner and I, alone represented the plaintiffs in the *Muller* case. In the months of May and June we expended over 1,000 hours on the case. A great deal of that time was spent interviewing class members, former Sambo's employees, including those in the finance and accounting departments, and reviewing and analyzing Sambo's accounting and financial records.

19. When it became clear that Touche Ross must be named, the issue arose as to whether my firm should be counsel to the plaintiffs in this action as well as in *Muller*. On the one hand was the fact that I had once represented

Touche Ross. On the other hand was the fact that were my firm not to act as counsel to plaintiffs in this action, the fund of knowledge accumulated in *Muller* would be unavailable to plaintiffs here.

20. I determined that the consideration in favor of representing the plaintiffs in this action outweighed those against. My representation of Touche Ross in *Cerro* was a special situation, unlikely in my judgment to be repeated; that representation terminated over two years ago; I had not since been retained by Touche Ross; nothing that I learned in confidence during that representation is involved in this case. On the other hand, if my firm does not represent the plaintiffs in this case an important fund of knowledge will be unavailable.

21. Before this action was filed I called the office of Rick Murray, general counsel for Touche Ross, for the purpose of discussing these matters. I was told by his secretary that he was out of town and would return to the office for only a single day before again leaving, I believe for Europe. I requested that Mr. Murray call me when he returned and before he again left and described the matter as having some urgency. Mr. Murray did not return my call. The danger of time and the statute of limitations defense did not admit of further delay and this action was then filed.

22. I have and will continue to keep the confidences of my former client Touche Ross. I do not believe that my firm's representation of the plaintiffs in this case is in any way inconsistent with that continuing duty or in any way detrimental to Touche Ross. I do not believe that my firm's representation of the plaintiffs in this case involves any impropriety either actual or perceived.

23. If, however, the Court believes that the public perception of the legal profession or the administration of the

judicial system would be adversely affected by the continuation of this representation, I offer to withdraw from such representation. I believe such a result is unwarranted, unnecessary and adverse to the interests of the plaintiffs in this case. It is made solely for the reasons stated above, should the Court determine it to be advisable.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Beverly Hills, California on this 5th day of October, 1981.

[SIGNED]

GARY D. STABILE